ilarly, the National Banking Act, which provides what interest the banks can charge and the results and penalties of taking usury, has been construed as sweeping away all state usury laws as far as they affect national banks.[9]

A recent New York case shows the far-reaching effect of this doctrine. The proposition is upheld that a note between A and B, which by state law is absolutely void for usury, is enforceable when discounted by a national bank. *Schlesinger* v. *Gilhooly*, 189 N. Y. 1.[10] Thus, through the power to say that a defense given by the state shall not be good against a national bank, the whole law of the state as to usury is rendered ineffective, for a note otherwise void can be made enforceable, as to the principal at least, by a sale to a national bank. The result is astounding, but seems a logical consequence of the power of Congress to pass exclusive laws as to the business dealings of national banks.

RECOVERY UNDER EXECUTORY ILLEGAL CONTRACTS. — It is a general rule of law that no cause of action arises out of an illegal contract whether recovery be sought on the contract for a breach of it or in quasi-contract. It is the settled policy of the law not to allow a legal right to be based upon an illegal transaction. Under no circumstances, it seems, can there be a recovery if the contract contemplates the performance of an act which is *malum in se*;[1] for in such cases the formation, as well as the performance of the contract, is an injury to the state. Thus, where there is an agreement to share the proceeds of a common crime, one criminal cannot recover from the other who takes the whole.[2] Again, if the illegal act, though only *malum prohibitum*, has been completed in whole or in part, the law will not interfere if the parties are equally at fault,[3] for the harm to the state can no longer be prevented. Thus, where a bankrupt paid a creditor a sum of money not to appear at his examination, nor to oppose his discharge, the bankrupt was not allowed to recover after the defendant had failed to appear at the examination, though no application for the discharge had been filed.[4]

But where the purpose of the contract is not *malum in se*, and is not accomplished, a recovery has been allowed in two sorts of cases. The first class is where neither party agrees to do an act illegal in itself, apart from the contract, but where the performance becomes illegal because done in pursuance of the contract. This includes the so-called "stakeholder cases," in which the loser is allowed to recover from the winner, if the stakeholder pays over the stakes after the loser has revoked his authority.[5] The policy of allowing a recovery in these cases is clear; either party is given a chance to avoid the contract and prevent its performance. The second class includes those cases in which, having paid the defendant to commit an illegal act, the plaintiff is allowed to disaffirm the contract at any time before the defendant has performed, and to recover that which he has advanced. Thus,

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[9] Farmers', etc, Bank *v.* Dearing, 91 U. S. 29.

[10] See 20 HARV. L. REV. 581.

[1] See Spring Co *v.* Knowlton, 103 U. S. 49.

[2] The Highwayman's Case, Scott, Cas. on Quasi-Contracts, 666. See Tappenden *v.* Randall, 2 B. & P. 467.

[3] If the parties are not *in pari delicto*, he who is less at fault may recover whether or not the contract is executed. White *v.* Franklin Bank, 22 Pick. (Mass.) 181. See 20 HARV. L. REV. 60.

[4] Kearley *v.* Thomson, 24 Q. B. D. 742.

[5] Love *v.* Harvey, 114 Mass. 80.

where a woman paid the defendant to procure a husband for her, she was allowed to recover the money so paid, since the defendant had not performed.[6] This, too, seems to be in accordance with the policy of the law to prevent, not the formation, but the performance of such contracts. Is a recovery allowable in a possible third class of illegal contracts, *viz.*, those in which the plaintiff agrees to do the illegal act, and, disaffirming after he has partially performed, seeks to recover for the partial performance? It was held in a recent Massachusetts case that he can recover so long as the part performance itself was not illegal. *Eastern Expanded Metal Co.* v. *Webb Granite and Construction Co.*, 81 N. E. 251. This seems correct, for as far as the illegal act is concerned the contract was still executory; and a recovery before the harm was done would tend to prevent the doing of it. Therefore the rule may now, perhaps, be broadly stated, covering all these classes of cases, that a recovery is allowed in quasi-contract for benefits furnished under a contract illegal but not *malum in se*, so long as no part of the illegal purpose has been consummated.

THE EXERCISE OF NON-JUDICIAL FUNCTIONS BY THE JUDICIARY. — In the European states the theory of separation of powers has been accepted as a decree that the legislative and executive branches, in the administration of public affairs, shall be free from interference by the judiciary.[1] In America, however, the separation of powers has not been taken as a limitation upon the judiciary, but rather as an elevation of it to the position of an independent department of government as supreme in its particular field as either of its co-ordinate departments in theirs.[2] If this theory of governmental organization is to be successfully executed, it is imperative that each department exercise vigilance to see that none of the functions delegated to it by the constitution are exercised by co-ordinate departments;[3] equally, it must be careful not to infringe the prerogatives of the other branches.[4] Moreover, a proper respect for its dignity as an independent, co-ordinate branch of government must compel it to decline to perform duties where its final action is to be subjected to review by another department.[5] It would seem that, with the prerogatives of each department thus guarded, the whole purpose of the separation of powers is achieved. Subject to these limitations each department should be free to perform any duties assigned to it. The practical difficulties in the operation of this scheme of government arise from the fact that all the functions of government are not capable of being readily subjected to classification as executive, legislative, or judicial. Indeed it is asserted that some of the functions of government may equally well be assigned to any one of the departments.[6] However, the tendency of the courts has been to insist that none but judicial functions may be exercised by the

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[6] Hermann *v.* Charlesworth, [1905] 2 K. B. 123. See 12 HARV. L. REV. 436.

[1] Lowell, Governments and Parties in Continental Europe, 55.

[2] See The Federalist, Number 51.

[3] See Taylor *v.* Place, 4 R. I. 324.

[4] Norwalk Street Ry. Co's Appeal, 69 Conn. 576; Shephard *v.* Wheeling, 30 W. Va. 479; Auditor *v.* Atchison, etc., R. R. Co., 6 Kan. 500.

[5] Note to Hayburn's Case, 2 Dall. (U. S.) 410. See United States *v.* Ferreira, 13 How. (U. S.) 40.

[6] Paul *v* Gloucester County, 50 N. J. L. 585. *Cf.* State *v.* Brill, 111 N. W. 639 (Minn.); Salem, etc., Corporation *v.* County of Essex, 100 Mass. 282.